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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 522

ROSA M. FIGUEROA DE ARROYO, IRIS TORRES DE HERNANDEZ, ANDREA COLON TUBENS, IRIS TRABAL QUINTANA, JOSE A. FRANQUI, LUZ ARMINDA TORO TIRADO, BENJAMIN TORRES RIVERA, CARMEN E. DE LA ROSA DE ORTIZ, ELSIE TORRES RAMOS, ALFREDO MOREU IRIZARRY, ELSIE LUGO BERNIER,

Petitioners,

vs.

PUERTO RICO TELEPHONE COMPANY,

and

SINDICATO DE TRABAJADORES PACKINGHOUSE, AFL-CIO, DISTRITO DE PUERTO RICO AND UNION DE EMPLEADOS DE LA INDUSTRIA DEL TELEFONO DE PUERTO RICO, LOCAL 963,

Respondents.

BRIEF OF RESPONDENT PUERTO RICO TELEPHONE COMPANY IN OPPOSITION.

JAMES M. POWELL,
GALA, LANE & POWELL,
Suite 705,
1250 Connecticut Avenue,
Washington, D. C. 20036;

FERNANDO RUIZ SUBIA,
MCCONNELL, VALDES, KELLY & SIFRE,
G. P. O. Box 4225,
San Juan, Puerto Rico
00936,

Attorneys for Respondent Puerto Rico Telephone Co.

MATTHEW E. MURRAY,
RICHARD L. MARCUS,
R. THEODORE CLARK, JR.,
JOEL H. KAPLAN,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
111 West Jackson Blvd.,
Chicago, Illinois 60604.

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Respondents.

BRIEF OF RESPONDENT PUERTO RICO TELEPHONE COMPANY IN OPPOSITION.

Respondent, Puerto Rico Telephone Company, has previously filed a petition for a writ of certiorari, No. 385, docketed July 13, 1970, to review the judgment and decision of the Court of Appeals for the First Circuit entered on April 17, 1970, reported at 425 F. 2d 281 (1st Cir. 1970). A complete statement of the case appears therein.

QUESTIONS PRESENTED.

1. Does the First Circuit's ruling that the evidence was insufficient to support Plaintiff Rosa Figueroa's claim of wrongful discharge raise a constitutional question or a substantial question involving unsettled principles of federal law?

2. Does the First Circuit's finding that the Union did not breach its duty of fair representation vis-a-vis Plaintiff Elsie Lugo Bernier raise any substantial question for decision by this Court?

3. Does the First Circuit's rejection of Plaintiffs' claim for attorney's fees raise a substantial question for decision by this Court?

CONSTITUTIONAL PROVISIONS INVOLVED.

"AMENDMENT VII.

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

REASONS FOR DENYING THE WRIT.

I. THE FIRST CIRCUIT'S RULING AS TO THE INSUFFICIENCY OF THE EVIDENCE SUPPORTING PLAINTIFF ROSA FIGUEROA'S CLAIM OF WRONGFUL DISCHARGE RAISES NEITHER A SIGNIFICANT CONSTITUTIONAL QUESTION NOR AN UNSETTLED PRINCIPLE OF FEDERAL LAW.

It is well settled that the setting aside of a jury verdict by a court on the ground of insufficiency of the evidence does not violate the Seventh Amendment. *Galloway* v. *U. S.*, 319 U. S. 372 (1943); *Boeing Co. v. Shipman*, 411 F. 2d 365, 374 n. 13 (5th Cir. 1969). The question they is what is the appropriate standard for a reviewing court to judge the sufficiency of the evidence.

At the outset, it is clear that since this is a § 301 action, federal law governs. *Local 164, Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Lucas Flour Co.*, 368 U. S. 95, 103 (1962). As such, the appropriate standard, utilized by the First Circuit here, 425 F. 2d at 288-289, and other circuits as well, *see, e.g., Boeing Co.* v. *Shipman*, *supra*, 411 F. 2d at 375 n. 16, is whether there is substantial evidence upon which reasonable men could differ.[1] Under this standard, given the uncontroverted and extensive criticism of Plaintiff Figueroa's performance as a telephone operator in 1961, 1962 and 1964 by her supervisor, the only witness proferred by Plaintiffs to testify as to the comparative abilities of Plaintiffs vis-a-vis junior employees, the First Circuit was eminently correct in ruling

1. Plaintiffs' contentions that the First Circuit utilized the scintilla of evidence test is refuted by the plain words of that Court: "We require *more* than a scintilla." 425 F. 2d at 288 (Emphasis added).

that the evidence indicating that Plaintiff Figueroa was improperly dismissed was plainly insufficient.'

Plaintiffs contend that this standard of review is inappropriate in that it conflicts with the standard adopted by this Court in FELA and Jones Act cases. *See, e.g., Wilkerson v. McCarthy*, 336 U. S. 53 (1949). But, as noted by the 12-1 en banc decision of the Fifth Circuit in *Boeing, supra*, 411 F. 2d at 372, 373:

> "Though we have heretofore adopted in Planters Manufacturing Co. v. Protection Mut. Ins. Co., 5 Cir., 1967, 380 F. 2d 869, the FELA test of the sufficiency of evidence to create a jury question as a uniform federal standard fashioning a rule of general application, we now reject the *Planters* principle and hold that the FELA test is peculiar to that kind of case as a consequence of the statute itself and is accordingly not applicable in non-FELA jury trials.
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> * * * * *
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> "Although the Supreme Court has not answered the question of law, no Circuit Court of the United States, other than the Fifth Circuit, has held that the FELA test of sufficiency of evidence is applicable in non-FELA cases. . . ."

In so ruling, the Fifth Circuit relied on the First Circuit's decision in *Dehydrating Process Co. v. A. O. Smith Corp.*, 292 F. 2d 653, 656 n. 6 (1st Cir.), *cert. denied*, 368 U. S. 931 (1961), which, in specifically rejecting the FELA standard, noted that such cases had to be considered "on their own bottom" and that:

> "We do not appear to have considered this question ourselves, but a number of other circuits have reached this result without even discussion."

In sum, the standard of review urged by Petitioners before this Court is presently the rule of no Circuit, and the one Circuit that had previously adopted it has recently and decisively, in an en banc proceeding, quite properly rejected it. Therefore, this issue is one upon which certiorari should be denied.

II. THE FIRST CIRCUIT'S DENIAL OF ANY RELIEF FOR PLAINTIFF ELSIE LUGO BERNIER DOES NOT RAISE A SIGNIFICANT ISSUE BEFORE THIS COURT.

The First Circuit found that, although there was a complete absence of hostility or bad faith, the Union here breached its duty of fair representation toward six Plaintiffs by its failure to file grievances for them. As for Plaintiff Elsie Lugo Bernier, however, the Court ruled that since the Union took her grievance to impasse and since the jury found no breach of the Union's duty of fair representation in her case, her claim was barred.

In so ruling as to Plaintiff Bernier, the First Circuit was clearly correct. Under *Vaca* v. *Sipes*, 386 U. S. 171 (1967), an individual employee has no absolute right to have his or her grievance taken to arbitration. Under *Vaca*, in the absence of a breach of its duty of fair representation, a union's decision not to press a grievance beyond any particular stage in the grievance procedure, as the Union here decided, is final and binding on that individual. Plaintiffs seem to contend, however, that because a jury determined that the Company had breached its collective bargaining contract by discharging Plaintiff Bernier, she should now recover. The simple answer to this contention is found in this Court's decision in *Vaca*, *supra*, 386 U. S. at 192-193:

> ". . . if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial."

Nor does *Moggie* v. *District No. 8, IAM*, 387 F. 2d 880 (7th Cir.), *cert. denied*, 391 U. S. 936 (1968), lend any sup-

port to Plaintiffs' position. There, Plaintiff *and her union* brought suit for breach of contract which the employer resisted on the grounds that no collective bargaining agreement was in existence. As such, it was not a suit merely by an individual employee under § 301. Given the fact that the union had joined the employee as a plaintiff in the suit, the court's order of arbitration was appropriate under *Vaca*. What *Maciae* does, however, is lend support to Respondent's argument (Petition No. 385, pages 24-28) that arbitration was an appropriate remedy in this case, rather than a jury or court determination of the breach of contract issue.

Based upon the foregoing, it is respectfully submitted that the First Circuit's denial of relief to Plaintiff Elsie Lugo Bernier raises no significant issue calling for resolution by this Court.

III. THE FIRST CIRCUIT'S REJECTION OF PLAINTIFFS' CLAIM FOR ATTORNEY'S FEES DOES NOT RAISE A SUBSTANTIAL QUESTION FOR DECISION BY THIS COURT.

In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U. S. 714, 717 (1967), this Court held:

> "The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. . . ."

Similarly, in actions under § 301 and under the Labor-Management Reporting and Disclosure Act (LMRDA), courts have generally rejected claims for attorney's fees. *See, e.g., Lee v. New Haven Printing Pressmen Local Union, No. 74*, 255 F. Supp. 929 (D. Conn. 1966); *McGraw v. United Assoc. of Journeymen & Apprentices*, 341 F. 2d 705 (6th Cir. 1965); *Bailey v. Netter*, 266 F. Supp. 165 (E. D. La. 1967); *Vars v. International Brotherhood of Boilermakers*,

215 F. Supp. 943 (D. Conn. 1963), *aff'd* 320 F. 2d 567 (2d Cir. 1963); *Magelssen v. Local Union No. 518*, 240 F. Supp. 259 (W. D. Mo. 1965); *New Park Mining Co. v. United Steelworkers of America*, 288 F. 2d 225 (10th Cir. 1961); *Leonard v. M.I.T. Employees' Union*, 225 F. Supp. 937 (D. Mass. 1964); *Boilermakers v. Rafferty*, 348 F. 2d 307 (9th Cir. 1965).

Plaintiffs' argument for attorney's fees is two-fold: first, "overriding considerations of justice . . . compel such a result," *Fleischmann Distilling Corp., supra*, 386 U. S. at 718; and, second, attorney's fees are recoverable under Puerto Rican law, *Pan American World Airways v. Ramos*, 357 F. 2d 341 (1st Cir. 1966).[2] As for the latter, while Puerto Rican law does provide for attorney's fees given unusual circumstances,[2] the First Circuit has recently indicated that *Ramos* is not to be read broadly and "that it is the exception when counsel fees should be awarded." *Banco Popular de Puerto Rico v. Deliz*, 407 F. 2d 1388, 1390 (1st Cir. 1969). Moreover, the First Circuit specifically found in this case that the Company had not frustrated the grievance procedure in regard to Plaintiffs. To find "obstinancy," which is the governing standard under this statute, in such circumstances, would be to tax the Company for its right to have its day in court.

As for the former, the First Circuit was correct in ruling that if attorney's fees are to be awarded, "such relief should be charged against the union." 425 F. 2d at 293. The Union is, after all, the statutory representative of the employees and, the costs involved, including attorney's fees, to contest an alleged breach of contract by the Employer would fall on the Union, whether the forum be

2. The law considered in *Ramos* was § 44.4(d) of Puerto Rico Rule of Civil Procedure:

> "Attorney's fees. Where a party has been obstinate, the court shall in its judgment impose on such person the payment of a sum for attorney's fees." 357 F. 2d at 342, n.1.

arbitration or a court suit. By not processing Plaintiffs' grievances—a failure which the First Circuit found constituted a breach of its duty of fair representation—the Union was relieved of such costs in this case. Where, as here, the Employer has done nothing to promote such an alleged breach and where it has done nothing to frustrate the grievance procedure, considerations of justice, in fact, compel the conclusion that it should not be taxed with attorney's fees.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that this petition for a writ of certiorari be denied.

Respectfully submitted,

JEROME POWELL,
GALL, LANE & POWELL,
Suite 707,
1250 Connecticut Avenue,
Washington, D. C. 20036,

FERNANDO RUIZ-SUBIA,
MCCONNELL, VALDES, KELLY & SUBIA,
G. P. O. Box 4225,
San Juan, Puerto Rico
00936,

MATTHEW E. MURRAY,
RICHARD L. MYERS,
R. THEODORE CLARK, JR.,
JOEL H. KAPLAN,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
111 West Jackson Blvd.,
Chicago, Illinois 60604,

Attorneys for Respondent Puerto Rico Telephone Company

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI IN NO. 385.*

In the Petition in No. 385, numerous authorities are cited reflecting the serious conflict between the Circuits regarding what conduct constitutes a breach of a Union's duty of fair representation. This Court's attention is directed to a recent Third Circuit decision, rendered since the Petition in No. 385 was filed, which further evidences this serious conflict. In *Bazarte v. United Transportation Union*, No. 18,464 (3rd Cir. 1970), 163 Daily Lab. Rep. A-3 (Aug. 21, 1970), handed down August 17, 1970, the Third Circuit was confronted with a claim that a union had breached its duty of fair representation by failing to press a grievance. In overturning the jury verdict and finding the union did not breach its duty, the Third Circuit ruled, 163 Daily Lab. Rep., at A-4, A-5:

> ". . . The union has an obligation in exercising its power as bargaining agent to act fairly under the collective bargaining agreement and not to assert or press grievances which it believes in good faith do not warrant such action. An employee, therefore,

* Petitioner, Puerto Rico Telephone Company, recognizes that this supplement to its original petition, No. 385, for a writ of certiorari is somewhat unusual. We have been informed by a member of the Clerk's office of this Court that recent cases may be brought to this Court's attention in Petitioner's reply brief. Since Respondent Plaintiffs have not filed a timely brief in opposition to No. 385 and it is unknown if Respondent-Union will file such a brief in opposition since its deadline has been extended by Mr. Justice Brennan until September 14, Petitioner is uncertain whether it will have an opportunity to file such a reply brief. In such circumstances, in order to bring this recent, important case to the Court's attention, Petitioner in No. 385 respectfully requests that this supplement be appended to its petition for a writ of certiorari.

> is subject to the union's discretionary power to settle or even to abandon a grievance, so long as it does not act arbitrarily, and this is true even if it can later be demonstrated that the employee's claim was meritorious. It is therefore essential to plaintiff's claim that there should have been proof of 'arbitrary or bad-faith conduct on the part of the Union in processing his grievance.' It follows from this that proof that the union may have acted negligently or exercised poor judgment is not enough to support a claim of unfair representation.
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> * * * * * *
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> ". . . Whether [the union representative] or his superior was unwise in his judgment or negligent in arriving at his conclusion, and therefore represented him inadequately, is not the issue in the case. The test is whether the union breached its duty of fair representation by dealing with his claim in bad faith or in an arbitrary manner.".

Contrary to this, the First Circuit has effectively ruled that a breach of its duty of fair representation occurs if a union commits an honest mistake. In the factual setting of the case before it—admittedly good faith motivation by the Union and vigorous pursuit of redress for Plaintiffs, as well as hundreds of other employees, in numerous forums—the First Circuit's ruling that the Union breached its duty of fair representation by not utilizing the grievance procedure for these Plaintiffs clearly equates negligence and/or poor judgment with breach. This is clearly contrary to the Third Circuit's ruling in *Bazarte, supra.*

The numerous factors that motivated Union President Sanchez in not pressing Plaintiffs' grievances—advice of counsel, complete lack of success with other grievances, a broad remedial order by the NLRB, to name but a few—have been set forth in Petitioner's petition and need not be recounted here in detail. What is important is that

the Union's judgment not to pursue these grievances through the contractual grievance procedure was not the product of whim or caprice.[1] And even if, viewed by the First Circuit years later, the decision not to pursue Plaintiffs grievances through the contractual grievance procedure was the result of poor judgment or negligence, though not bad faith, under this recent Third Circuit decision, as well as numerous other authorities (see Petition No. 385 at pages 13-24), this could not constitute a breach of the Union's duty of fair representation.

It is respectfully submitted that this recent decision lends further support for the granting of the writ of certiorari in No. 385.

Respectfully submitted,

JEROME POWELL,
GALL, LANE & POWELL,
Suite 707,
1250 Connecticut Avenue,
Washington, D. C. 20036,

FERNANDO RUIZ-SURIA,
McCONNELL, VALDES, KELLY & SIFRE,
G. P. O. Box 4225,
San Juan, Puerto Rico
00936,

MATTHEW E. MURRAY,
RICHARD L. MARCUS,
R. THEODORE CLARK, JR.,
JOEL H. KAPLAN,
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON,
111 West Jackson Blvd.,
Chicago, Illinois 60604.

Attorneys for Respondent Puerto Rico Telephone Company.

1. It is curious to note that the only evidence before the First Circuit indicating that Plaintiffs were discharged because of automation rather than subcontracting—which, if true, would conceivably have posed a question as to the availability of relief in the NLRB action pursued by the Union—was a statement by Company representative Orellana to Sanchez. That Sanchez could have taken this statement with more than an ounce of skepticism is buttressed by the fact that the Company's argument before the Board that employees had been laid off because of overstaffing, caused, in part, by automation, rather than subcontracting had been summarily rejected by the Board. 149 NLRB at 962, n. 37.